53

No. 274

Brief of Atty. (Richards) for Appt.

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In the Supreme Court of the United States.

October Term, 1898.

The United States v. The Tennessee & Coosa Railroad Company, Hugh Carlisle, et al.	No. 274.

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THE UNITED STATES
v.
THE TENNESSEE & COOSA RAILROAD Company, Hugh Carlisle, et al.
No. 274.

STATEMENT OF THE CASE.

This was a proceeding in equity in the circuit court of the United States for the southern division of the northern district of Alabama. The United States, in 1856, granted to the State of Alabama, for the purpose of aiding in the construction of certain railroads, constituting internal improvements of the United States and ways of commerce, a portion of the public lands held in trust by the Government for the people of the United States, and among others, certain sections lying along a line from Guntersville to Gadsden, a distance of about 36 miles. The State turned these lands over to the Tennessee and Coosa Railroad Company, an Alabama corporation, to be held and applied as provided in the act of Congress. That act required completion of the road within ten years, and the disposal of the lands by the State only

in a specified manner. One hundred and twenty sections of land were certified to the State at an early date by the usual information certificates appropriate to grants *in presenti* when no patents are provided for, and as to some of those lands indemnity certificates passing title after selection and approval. Nearly all lands were sold by the company, although the road was not completed within ten years, and the Government alleges that they were not sold in the manner provided in the act, even as to the 120 sections, or 76,000 acres. The Government in its bill alleged that none should have been sold, because *all* the sales took place after the end of ten years; and, going into details as to some particular sales to one Hugh Carlisle, further alleged that these were colorable and fraudulent, for the purpose of defeating the reversion to the United States. It also anticipated the defense that Carlisle was a *bona fide* purchaser, and denied it. A decree was asked declaring all the approvals and certificates by or for the railroad company vacated, and asking that all right, title, or interest of the defendants be divested and vested in the United States, and especially that the sales to Hugh Carlisle be set aside and canceled on the local records, and for further relief, as might be proper. An injunction was asked, and also a receiver, who was appointed and acted until discharged as useless, when everything was turned over to Carlisle, because he claimed to be a *bona fide* purchaser, and it was held that there was testimony to support his claim. (R., p. 159.)

In brief, the bill is one alleging that all the lands intended to pass under the act of 1856 rightly belong to

the United States, and is substantially a bill to quiet title to those lands and recover title where necessary and for an accounting.

It appears that some of the sales by the company were for cash, but very few of them. Others were not paid for except in part, and a list of these is in the record (Exhibit A to Carlisle's answer). These and the lands sold to Carlisle amounted to 83,522.84 acres, the lands sold to Carlisle being 41,149.84 acres. The precise number of acres in excess of the 76,000 acres, or 120 sections, is not ascertained by the decree of the lower court, which denied, upon two grounds, the relief prayed for—that the company had had a right to sell 120 sections, and as to 17,410.33 acres, the last lands sold to Carlisle, that these were opposite a portion of the road completed before the general forfeiture act of 1890, and hence were not forfeited. As the road was completed only to Littleton, in section 20, township 11, range 5 east (12 Land Dec., 255), and these lands include parts of sections 9, 11, etc., and lands in township 10, I think this is a mistake. The court of appeals affirmed upon the same grounds, and also without separating any lands except the 17,410.33 acres from the 120 sections.

Carlisle's answer asserts that all the lands were certified to the State; but he seems to mean all *his* lands, and, as to part of these, i. e., the 17,410.33 acres, to mean that they were certified under an act of April 10, 1869, to a company entitled to an undivided moiety, and not to or for the Tennessee and Coosa Company, claiming the other half.

He also asserts that all the lands as to which he holds notes (the unpaid-for lands) were among the 120 sections first certified. These seem not to have been conveyed, but contracted to be sold.

We hope to submit a map, without which it is difficult to know the correctness of these assertions of Carlisle. It is believed that they are not entirely, but nearly, correct.

The answer of the Tennessee and Coosa Company states that the 23,739.51 acres first sold to Carlisle were approved to the company as part of the first 120 sections, as the answer of Carlisle says that they are within such sections, and that the 17,410.33 acres are opposite completed road. The 42,372.84 acres sold but not paid for are treated by the courts below as belonging to Carlisle, the trial court merely remarking that he succeeded to the right of the company to the unpaid purchase money, and giving no reason.

It would seem, however, that he claimed merely to hold the notes as collateral for about $3,000 of debts alleged to be due in 1887 from the company, and, as the purchasers refused to pay, that these lands may admittedly belong to the company, if they do not to the Government. Practically all the purchase money seems to be unpaid. No party is disputing the claims of the Government except Carlisle (now his representatives), the Tennessee and Coosa Company, which claims no title to the Carlisle lands and says the notes for unpaid-for lands are in Carlisle's hands as collateral, and two purchasers of 40 and 80 acres. All other purchasers and the settlers are willing to have the Government succeed.

ASSIGNMENT OF ERRORS.

1. The court of appeals erred in affirming the decision of the circuit court.

2. In not reversing it.

3. The court of appeals should have reversed the decision and sent the case back with directions.

4. It should have directed a decree in favor of the United States.

5. It should have directed a decree in favor of the United States as to all lands not within 120 sections certified along a continuous 20 miles of the road, or at least those certified only by information certificates and lists, i. e., place limit lands.

6. It should have directed the ascertainment and separation of the lands by the court, or with the aid of a master, and confirmed to the United States all lands not sold and not within said 120 sections, and all lands without said sections whether nominally sold or not.

7. It should have adjudged that Hugh Carlisle was not a *bona fide* purchaser of any of the lands, and directed a decree accordingly in favor of the United States.

8. It should have adjudged that he was not a *bona fide* purchaser of the 17,410.33 acres not within the said 120 sections, and directed a decree accordingly in favor of the United States.

9. It should have directed a decree in favor of the United States as to the 42,372.84 acres not conveyed or paid for.

10. It should have directed a decree in favor of the United States as to lands not within either the said 120 sections or the 17,410.33 acres whether sold or not.

11. It should have reversed the decision of the circuit court for the reasons stated in the assignment of errors submitted to it, and have directed a proper decree or other proceedings.

12. The court erred in not directing the action hereinbefore stated as proper to be directed, or further proceedings with a view to that action.

13. The court erred in not directing a decree that the unpaid purchase money for such lands as were sold, but not properly sold, be collected or collectible for the United States.

14. The court erred in not directing that rents due for lands not properly sold be collected or collectible for the United States.

BRIEF.

It has been a principal subject of discussion in this case whether Hugh Carlisle is a *bona fide* purchaser or, on the other hand, is not only not a *bona fide* purchaser of all or any of the lands, but has taken the title with a view to avoiding the recovery of the lands by the United States. In this discussion the charge of actual fraud or colorable sale has naturally excited special interest, and the trial court seems to have regarded it as sufficient to find, in the case of the lands claimed by Carlisle, that the "charges of fraud" are "not sustained by the proof—at least by such measure of proof as is required in a case like this," and to raise a doubt that the accounts and settlements of Carlisle with the company can be considered at all, because "the company obtained the title from the State of Alabama, acting under a statute of the

State accepting the grant of land and the trust created by the act, and in the case of the *United States* v. *Desmoines Company* it is held that the knowledge and good faith of a legislature are not open to question." This latter proposition needs no discussion, as no one is questioning the good faith of the State.

The court does not make any distinction between the question whether Carlisle is a *bona fide* purchaser and the question whether he is a fraudulent holder for the company. The fraud is required by it to be proven in the most absolute manner by the United States.

In view of this attitude of the court we submit at the outset that the question whether Carlisle is a *bona fide* purchaser went to the court of appeals unaffected by any supposed determination on the facts by the lower court, and, as the lower court did not pass upon that question at all, it comes here also unaffected by the rule of convenience that a supreme court will be disinclined to reverse upon a new decision by it as to questions of fact.

The bill treats the fraud as merely part of a plan to enable Carlisle to set up and claim that he was "a purchaser for value and in good faith from said railroad company," when, as the bill alleges, he was quite the opposite. And the answer of Carlisle takes issue with the allegations and does set up that he was a purchaser in good faith and for the consideration named in two deeds to him. The railroad company sets up the same thing.

This is not a criminal proceeding. We bring Carlisle into court as a party because we know that he claims to be owner of some of our lands granted to the State, and, anticipating his pretense of *bona fide* purchaser, we deny

that, and go further and allege that he is quite the opposite—a fraudulent purchaser.

The trial court may be right in thinking that the fraud charged should not be presumed, but must be distinctly proved, as alleged, for the court to find that fraud; but as soon as we show—if we do show it—that the lands were our lands, and that the company had no power to sell them, not only are we not required to make out absolute proof or any proof of fraud committed by Carlisle, but the burden of proof is entirely shifted from us. If he sets up, notwithstanding all this *prima facie* case of ours, that we ought not to have our lands because he is a *bona fide* purchaser, the burden is on him to show that he is. And he does set up that defense.

We must make out our right to the land, so far as not affected by the principle of *bona fide* purchase, and anyone who relies upon that principle to deprive us of our land, thus shown to be our land, has very distinctly to prove that he comes within the protection of that principle. We think Carlisle does not satisfactorily prove this.

This the trial court naturally, but erroneously, lost sight of, and this court should examine the evidence to see if the defense is made out.

If Carlisle was a *bona fide* purchaser, obviously the charges of fraud were of no consequence; if they were not true, yet it would not necessarily follow that he was a *bona fide* purchaser. The charges of fraud have tended to obscure the issues, which are, in effect, first, are we entitled to the lands as a matter of law and title; second, are they nevertheless in the hands of a *bona fide*

purchaser who should not be disturbed. To establish the first proposition in our favor shifts the burden to whomsoever asserts a *bona fide* purchase. We properly bring in as parties those expected to assert that, and we also properly say why we bring them in, and suggest a doubt that their pretensions, if any, can be sustained. That is the theory of our bill, and we submit that the trial court could not properly dispose of it as it attempted to do, and that the evidence should be weighed by this court without any prejudice derived from the trial court's remark about the insufficient measure of proof of a particular alleged *fraud*.

2.

It is alleged by us that all the lands granted to the State for this line of road were forfeited to the United States by the terms of the granting act, because ten years elapsed without the completion of the road or any serious progress in that direction, and *no* lands had then been sold.

The general answer to that is that 120 sections could be sold in advance even of beginning the road, and the case of *Courtright* v. *R. R. Co.* (21 Wall., 310) is relied upon in support of this; the case of *Schulenberg* v. *Harriman* (21 Wall., 44), and the case of *United States* v. *Loughrey* (172 U. S.).

Conceding this, for the present, it does not justify the affirmance of the decree in this case, which manifestly deprives us of more than 120 sections.

In order to meet this objection, however, it is alleged that 17,000 acres are opposite a part of the road (10

miles) which was completed when the general forfeiture act of 1890 was passed, and that that act did not forfeit, or, in other words, confirmed the sale of these lands.

But this does not account for all the lands claimed to be granted to the company, and we are seeking a remedy as to all of them.

It would seem, therefore, on the face of things, that the decree of the trial court and its affirmance were erroneous and contrary to equity.

The fifth paragraph of our bill and the second of the company's answer and second of Carlisle's distinctly put in issue the right of the United States to all lands granted by the act of 1856, and we are entitled to a decree accordingly.

3.

The act of March 2, 1896, concerning *bona fide* purchasers and the bringing and maintaining of suits where they are concerned, will doubtless be considered in this connection by the court, together with its own opinion in the case of *United States* v. *Winona and St. Peter Railroad Company;* and, in view of these and the Courtright Case, we wish, first of all, to direct attention to the 17,410.33 acres lying beyond the 120 sections which are now, and, as it appears in the testimony, were by a lawyer, when the two deeds to Carlisle were made, said to be ruled by the Courtright Case. As to the one deed, accordingly, there was a warranty; the deed of the 17,000 acres is, on the contrary, a mere quitclaim deed.

And for the present we shall assume that an outright and not a colorable sale took place, in order to submit a

proposition of law as to *bona fide* purchase, stripped of all controverted facts, and assuming that the definitions of such purchase in the Winona and St. Peter Case are applicable in most respects to a purchase of these lands.

Let us see what those definitions of good-faith purchase by this court really are, in order to consider a question of *power* and *notice*, assuming the case in all other respects like the Winona and St. Peter Case, and assuming the definitions referred to correct and, but for *this question*, applicable.

The Department of the Interior has *general power* to dispose of public lands of the United States, and when it erroneously disposes of them it is not acting without power to act, and a title passes.

In such cases Congress has seen fit to confirm the title when in the hands of *bona fide* or good faith holders after erroneous or misleading patent or certification.

A State has no control over United States lands, and can not pass any title to them except as specially empowered.

As to these 17,000 acres of lands outside the first 120 sections, there was no certification to the State except to give or indicate a moiety granted to *another company*. But let us ignore that difference between this and the Winona and St. Peter Case.

The State held the legal title by and under the granting statute, but was authorized to sell "only in the manner following."

The manner following contained the prerequisite to any sale that the governor should make a certain certificate to a certain fact.

That certificate he did not make.

Hence the title is not in the hands of the pretended vendee Carlisle, and so he is not a *bona fide* purchaser.

The pretended sale by or on behalf of the State was *without power to sell*.

In the Winona Case, in 165 U. S., this court requires that the land shall be public land in the statutory sense, evidently meaning that it is beyond the *power* of the Land Department to dispose of any other and *within* its power to deal with practically all that is such.

Here the State was intrusted with the lands, without power to dispose of them except "in the following manner"—first, a certificate of the governor to the existence of a certain fact.

The State was entrusted with the legal title and made the agent of the United States, with a very special and limited power to dispose of a few lands in a *certain event*, and *no other*.

It was not given a beneficial title to them apparently complete and good, as usually is the case in a direct grant to a company. It was an intermediary and agent for a sole purpose. No title to itself for its own use was intended. The State as a State, as a government, was permitted to do what the Interior Department does; but only for one transaction, to be carried on "in the manner following," and no other. The Interior Department is a general agent.

If the Interior Department, in passing to private persons the beneficial title, must confine itself to its power under the law in order that a bona fide purchase may exist, why not the State?

In the Supreme Court's opinion reference is made to a provision authorizing a purchaser from a private company of lands granted, to all appearances, by Congress, *to buy these* from the *Government*; but there Congress had *itself* conveyed a complete legal title (good, without patent) to the whole of particular sections—a title final, beneficial, with metes and bounds defined. It was an *apparent* perfect title to *any given land*, and could only be seen to be otherwise by a new construction of the grant or an examination of matters *outside of the statutory conveyance in presenti, or both*. No condition was attached to the title.

It was the act of the Federal Government itself to put into the hands of the private company this apparent perfect, alienable, unconditioned title, and so Congress was willing to *sell* such lands, when purchased in *good* faith, to the purchaser.

But from this the court does not deduce as a general proposition that there need not be a *title* given by one who has title in fact, and power to sell, or else a deed by one who has gotten an *apparent* complete title of his own, through the act or fault of the plaintiff, which title the plaintiff is estopped to deny to be what *he* has made it appear to be.

If A, not having title to my land, gives a deed to it as his own, *I may be estopped* to deny that it was his land, and the purchaser, in equity—from which the whole notion of good-faith purchaser comes—is as safe from me as if A had owned the land.

But if A gives a deed to my land as my land, he being for some things my agent, and if I am *not* estopped to show

the truth that, while I gave him in trust the legal title, I gave him no power to sell the land except after a future event, which never happened, the so-called purchaser, who really has bought nothing at all, is no purchaser at all.

This present so-called purchaser, Carlisle, is precisely in this latter predicament.

No purchaser of a large body of these United States lands could allege that he did not know that the only power of the *State* over them was that conferred by the act of Congress of 1856.

What appears manifestly and without extraneous proof upon the face of that law no purchaser under the State can say he did not know.

But it appeared on the face of that law that as a condition precedent to the State's doing anything with *these* lands outside the 120 sections, the governor must certify that 20 miles of road have been built.

Now, who is it that must claim not to know that the governor had not so certified, when the supposed purchase was made?

The *builder of the road*, who knew that no such certificate could have been made, for the simple reason that no such 20 miles of road had been built; the builder of the road, who was also a most active director of the railroad company, who had been connected with the road since the year 1844 and contracted in 1859 to build it, as he says in his answer. Down to 1885 but 5 miles of the road had been built by a railroad company other than the Tennessee and Coosa in 1870–1885. Afterwards, and before September, 1890 (finishing a few days before the

forfeiture act of that year), Carlisle extended it to a total of 10 miles and a fraction.

What the act of 1856 says on its face we are at perfect liberty to assert and do assert, and we say that such a purchaser is no purchaser, for he got no title and we are not estopped to say so. Carlisle expressly admits that he bought with knowledge that no 20 miles of road had been built. (R., p. 169.) He also speaks of his company's getting the act of 1856 passed.

Whether a man that knows he is getting no title can be said to be a "good-faith *purchaser*" we submit to the wisdom of the court.

The case is wholly different from the Winona and St. Peter Case in 165 United States.

There the Interior Department was a *general agent* for the disposition of *all public lands*, and though facts existed in the case of any part of a section tending to except it from the general conveyance of many sections, it was natural to presume that the Secretary had *ascertained the contrary* before certifying as he had done.

Here the very man who was creating the fact which was a condition precedent to the existence of *any power to sell* is seeking to escape from the knowledge that he had not created that fact and that no one else had.

There is no intention in that decision to say that a purchaser was not bound to know the tenor of the grant under which he claimed title, but only that he was not bound to know all extraneous facts upon which it might possibly be supposed to put one upon inquiry and not bound to know that for many years the Interior Department had mistaken the meaning of the grants when

certifying. These lands were never certified at all except properly for another company owing a moiety, and so the Interior Department never misled anyone about them by "erroneous" action.

One who knew the tenor of the act of 1856, and was the builder of the road, knew that the State could not dispose of the land, for the act showed this on its face.

There had been no erroneous certifying by the Secretary. He seems to have properly certified 120 sections to the State shortly after the act of 1856 was passed, to be held as therein provided, and disposed of only in the manner thereby authorized. If information certificates as to place limit lands among these 17,000 acres had been issued, however, they would not have been intended to and would not constitute the certifications or patents authorized by law to transfer title, and would have added nothing to the title passed by the act of 1856 itself.

What is to estop the Government? What impairs its equity, when it asserts that these lands equitably belong to it?

The supposed purchaser, without our resorting to *constructive* notice of anything, knowing the law, as manifestly he did and knowing the facts, acted with his eyes open to all the rights of the United States and all the lack of power of the State. It is needless to say that the company was precisely in the situation of the State as to lack of power to sell.

Carlisle bought nothing, was misled as to nothing, was ignorant of nothing, and got nothing.

The Government did not need to watch the State or follow its operations. It protected itself by the lan-

guage of the original act, certainly so far as *this* purchaser is concerned. When the fact existed and the governor was willing to give his solemn assurance to that effect, then the State was to sell certain lands turned over to it by the United States, and before that it was powerless to do so. Of this everyone was informed by the law, but especially one who bought and built under the law. And such a one had the most absolute knowledge of the nonexistence of the certificate, because he knew the fact did not exist. (165 U. S., 485.)

4.

But it is said that these 17,000 acres of land were in 1890 opposite constructed road. Part of them were, part were not, and the former may now be considered.

It appears that at the time of supposed purchase and long after—down to and beyond the date of the forfeiture act of 1890—no 20 miles had been constructed. The Tennessee and Coosa and the State, under the act of 1856, never constructed 20 miles.

The general forfeiture act of September, 1890, intends to forfeit lands opposite unconstructed portions of road. It intends to forfeit them *for that reason*. It intends by no means to say that no lands are to be otherwise and for other reasons forfeited; that all conditions precedent in all cases of land grants are waived. It purports to waive nothing, but to forfeit for a cause common to all the old grants of lands for railroads—failure to construct prior to September, 1890.

The courts below the trial court very distinctly take the position that only Congress could insist upon the forfeiture and that by the act of 1890 it omitted to do so and did not do so by any other law.

The cause of forfeiture arose under the act of 1856 and the Attorney-General asserts the forfeiture in this present proceeding. When he asserts it the Government asserts it, as he is the Government for such a purpose, being occupant of the office of Attorney-General, an office borrowed bodily from Great Britain. We think there was not only a forfeiture, but a trust which has failed, leaving a mere naked title as against us, which should no longer embarrass us, and that on the Attorney-General's application the court should brush it away, whether the lands are opposite completed road or not.

It is true that the court says, in reference to a similar grant (*United States* v. *Loughrey*, 172 U. S., 212), that it by no means concedes that the title given the State was held by it as a trustee; but that was an immaterial question, or so held, and the point was simply not conceded. We do not know that, in any technical sense, it is necessary to establish it in this case, for in the same opinion an immediate right of possession was argumentatively conceded, in case there was a breach of obligation on the part of the State (p. 216), and we are not alleging an immediate right of possession for the purpose of an action of trover to recover severed timber, but rather enforcing the right to assert title as against one who, under a void sale, claims it.

It makes very little difference what we call things, so long as the power of the State was limited and it could

not sell the lands except as the work progressed and after a certificate that 20 miles had been constructed. When the land is found in possession of a pretended vendee of the State, buying outside of that trust, or whatever it should be called, a court of equity will hardly tell the grantor he can not maintain a bill against that vendee, who had full knowledge of the trust or power and its limitation. How is he to enforce the restriction in the grant? Is he to lose his land upon a disregard of that restriction by a railroad company which seeks to abuse the confidence of the State, and is equity powerless to help him? These lands are unsold, because the pretended sale is void, and the act of 1856 says that all lands unsold shall revert. The forfeiture act of 1890 was a reentry and more; it expressly revested the unsold lands in the United States. Within the meaning of the transaction, lands sold were those sold in the manner provided by the act of 1856 as the *only* manner, and those not so sold were intended to revert. The law should be read as a whole, and so read, there is no doubt that such is its meaning.

That act of 1890 was intended to take away lands and not to grant them, and it is too well settled to need discussion that lands and rights of the public can not be granted away except in the most *explicit, affirmative* terms. But we do not understand the courts below to contend that the act of 1890 did more than *omit* to express a Congressional intent to so insist. They simply *deny the Attorney-General's power* in the matter.

It made no grant to the company of the 17,000 acres, or of that part of them opposite completed road.

5.

To recapitulate:

We are claiming title to all the lands supposed to be granted, and the suit is practically to quiet and recover title to all of them. As to these lands, certificates or patents in the statutory sense need to be canceled only as to the indemnity lands, within the first 120 sections.

We bring in as parties all whom we know to be adverse claimants, in order to get rid of their claims.

As to Carlisle, we incidentally allege that he is a mere straw man, representing in reality the railroad company in order to make the lands appear to be *sold* lands and himself a *bona fide* purchaser. The more important question is, is he a *bona fide* purchaser, and that is for him to show, after our right is made out.

He claims to be that as to lands not within the 120 sections, and we point out that he is not shown to be a *bona fide* purchaser of *those lands*, even in the Congressional sense of the phrase discussed in the Winona and St. Peter Case, because he knew in fact and fully that the State or company had no right to dispose of them.

If it is claimed, however, that title to lands opposite constructed road was confirmed by the act of 1890, and some of these lands were opposite such road, we deny that to be the intent of the act of 1890.

Even upon the principles as to *bona fide* purchase laid down in the Winona and St. Peter decision, we thus show that these lands claimed by Carlisle under his *quit-claim* deed ought to be adjudged to us.

This leaves for consideration lands similar to these that is, not within the first 120 sections—held by *others* than Carlisle, and what we shall say as to our right to them will apply to a portion of the ones he claims.

The road being 36 miles and a fraction long, and the 120 sections absolutely required to be along 20 consecutive miles, and being in fact, as certified before the war of 1861, at and near the Guntersville end, 16 miles and a fraction of road, at least, remain to be considered. Ten miles, beginning at the Gadsden end, were constructed before the act of 1890, leaving at least 6 miles; so that, obviously, the easy method resorted to by the lower courts of dividing all the lands into 120-section lands and lands opposite constructed road ignores our rights along 6 miles, to say nothing of the large body of lands along the 20 miles referred to, but *not* in the 120 sections of place and indemnity certified before the war, and opposite *uncompleted* road in 1890.

We say, then, as to all lands *outside* the first 120 sections and not opposite the constructed 10 miles of road, that Congress in 1890 resumed title and declared them restored to the public domain.

We are seeking to quiet title to them, not to recover it. That has been done already, so far as Congress was able; and Congress was able to do this, unless any of the lands were in the hands of persons whom the *courts of equity* define to be *bona fide* purchasers.

If Congress, however, has voluntarily permitted other persons to have title, it could do that.

6.

But our next proposition is that the statutes of Congress relating to *bona fide* purchasers or good-faith purchasers, as discussed in the Winona and St. Peter Case, do not give title or confirm title to such lands as these.

These lands were never certified, erroneously or otherwise, or patented. They were never authorized to be sold, in the absence of the governor's certificate. Any pretended sales of them were absolutely without power and void.

The act of 1890 absolutely reclaimed and restored the title. Since then it has been in the United States, and the lands *part of the public domain*. The law does not regard them as in the hands of anybody but the Government.

This seems to be clear; and as all sales were void, and the act of 1856 was notice to all the world that any such sales were unauthorized and no one was misled by any certifying, there can be no *bona fide* purchaser who, notwithstanding the act of 1890, must be protected as a genuine ordinary *bona fide* purchaser and can hold on to the lands and no *bona fide* purchaser in the new statutory sense.

We ask, therefore, a decision that absolutely all lands not within the 120 sections, and not opposite the constructed 10 miles, belong to the United States.

As to those opposite the 10 miles, even those not claimed by Carlisle, we think the same decision must be made as to all persons claiming them, his case merely being an extreme one. The lack of power and the

notice by the face of the act of 1856 were common to all cases where lands beyond the first 120 sections are claimed. No certifying misled any one. The act of 1890 granted or confirmed nothing. It was simply a forfeiture act, and simply forfeited title opposite uncompleted road for one reason, as the Attorney-General is seeking to question title opposite completed road for another. Our bill filed had the same effect as the act of 1890, in asserting the rights of the Government.

No building of the road after the passage of the act of 1890 was authorized. The granting act was thereby repealed and ended. Nothing could thenceforth be earned by a pretended compliance with it, and all that is said in the record about what was done by an entirely different railroad company not claiming the land grant and for its own purposes, after September 29, 1890, is irrelevant to this case.

The lands not being certified or patented do not come within the gracious dispositions of the acts of 1887 or 1896, so far as the title of the United States is concerned. Section 5 of the former act does not seem to apply to them, but if it does, it can not affect this suit, for it distinctly recognizes that the lands it applies to belong to the United States.

The principles of the Winona and St. Peter decision do not extend to these lands outside of the 120 sections, and Congress has not waived its rights as to any of them, whether opposite the constructed 10 miles or not.

7.

This leaves for consideration the lands in the 120 sections certified in 1860 and thereabouts, the indemnity lands by legal certificates and the others by mere information lists unknown to the laws. These others are not affected by the acts of March 2, 1896, etc., which manifestly concern *erroneously issued titles.*

Some of these are claimed by Carlisle, under his warranty deed. Some seem to have been sold to others for cash; some are included in those "sold" to others by the company long after the ten years allowed for building the road had expired, but not paid for. Notes for the purchase money due the company for these and other lands are in question. These seem to have been put into the hands of Carlisle as collateral for a debt; but the real *proven* debt seems to have been paid and overpaid and twice paid, and he still held the notes. The purchasers have refused to pay, believing that the lands belong to the Government. They do not claim adversely to the Government's contention in this suit, but are willing to have it succeed.

The trial court, without explaining itself, and without separating the lands represented by the notes, with regard to those in and any out of the 120 sections or otherwise, treats the notes as belonging to Carlisle. He "succeeded to the rights of the company." Carlisle says the lands are all in the 120 sections, and probably this is so.

It is apparently contended on the other side that the 120 sections are lands the title to which could be disposed of, under the Courtright decision, even after the

ten years expired, and that being such, whether they are to be regarded as still in the hands of the grantee and therefore not sold within the meaning of the act of 1856, and whether sold for the purposes for which they were to be sold—in fact, all questions about them are regarded as irrelevant, in view of the Courtright Case.

We think the Courtright decision has been somewhat misunderstood and a good deal overstretched in application, and that, even if not, we still have some equities with regard to the 120 sections, *even where deeds were given*, as in Carlisle's Case.

That case and *Schulenberg* v. *Harriman* were between individuals, not suits by the Government asserting its rights.

In the Courtright Case the grant was of 1856; grading was done by Courtright in 1857 and 1858, and the 120 sections sold to him and others *in those years*. The sales were held to be good, and we see no reason to doubt that they were.

They were made in good faith to raise money for preliminary work on the road, took place promptly after the act was passed, and in all respects were legitimate transactions, in accordance with the very terms of the law.

But that is not this case. Our grant was of 1856 and the sale of these lands took place wholly after the ten years limited for the completion of the road had expired, and in a very questionable manner, so far as Carlisle's deed is concerned.

The Courtright Case says nothing but what the act of 1856 says, and has no bearing upon the question here.

But it is said that in *Schulenberg* v. *Harriman* (21 Wall., 44) we have a decision against us. But that case, like the Loughrey decision, is a suit concerning timber, and what is decided is that title remained in the State, so that Harriman, as agent of the State, properly seized certain logs wrongfully cut by Schulenberg, a trespasser on these lands of the State.

That is the whole decision. No question of a power of the State to sell, subject or not subject to the grantor's rights, was involved, and any expressions on that subject are mere dicta. The case, in short, is identical with the Loughrey Case. In the Loughrey Case, however, a forfeiture act had been passed, but not until after the timber was cut, and a present right of possession did not then exist in the United States, at least as to the severed timber, so that trover would not lie.

It must be obvious that these cases are not in point.

Here the United States has passed a forfeiture act, and is not alleging that it had at a given time before that an immediate right of possession; but that from the time of forfeiture incurred, now that it has been enforced by the grantor, no *title* as against the grantor to lands then unsold could be given.

The act of 1890 may be said to relate back, for the benefit of the grantor asserting the forfeiture, to the forfeiture, so far as *title* is concerned when title is claimed by the Government's Attorney-General.

That is the practical effect. We assert that lands unsold in 1866 could only be sold subject to the rights of the grantor. If they were sold, only the grantor could complain, or question or defeat the sale. Like an

overdue note, they were taken with all the equities liable to be enforced, and, unlike such note, could not possibly be in the hands of a *bona fide* purchaser in any Congressional or judicial sense of the phrase, because the law on its face was notice of the rights of the Government to anyone buying after 1866.

The condition subsequent as to completing the road applied to all lands *unsold* in 1866, whether in the 120 sections or not.

The record shows that Carlisle knew all about the act of 1856 and was aware of the very question we are discussing, but *anyone* buying these lands *under that law* must be presumed, in fact as well as in law, to have known its plain terms. It was part of his chain of title and the chief part. He needed no extraneous information to see that the ten years had long since expired, and that the lands were forfeited to the United States.

As Sheppard's Touchstone (p. 125) is quoted in *United States* v. *Schulenberg*, we quote the following from page 120:

> And if he that hath the estate grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereto it is annexed; so that although the same do pass through the hands of an hundred men, yet is it subject to the condition still.

The lands unsold in 1866 were unsellable, except subject to the right of the Government from that time to enter and take them. That was the condition of the grant, if it is not to be regarded as more than a private deed, and that condition could not be gotten rid of. No

better title or estate than that was in the State or company under the act of 1856 and no better could be transferred to others.

See also:

Jackson v. *Tapping*, 19 Amer. Dec., 515; *Moore* v. *Pitts*, 53 N. Y., 89; *Cross* v. *Carson*, 44 Amer. Dec., 745; *Swann & Billups* v. *Larmore*, 70 Ala., 564.

8.

But even if all this is erroneous, decisions of courts usually proceed upon certain assumptions.

Suppose it is true that in a perfectly fair and proper transaction the lands could be sold in 1887 freed from the condition, we are dealing here with a different state of facts and what seems to us a mere scheme to hold on to lands which since 1866 the Government has been threatening to recover from the State, or what is the same thing here, the company.

In equity, it seems to us these 120 sections should be regarded as unsold lands down to the act of forfeiture of 1890, by reason of this scheme and palpable effort to show title out of the company so far as the Carlisle lands and the unpaid for lands are concerned.

The record seems to us full of evidence of such a scheme. In one place the lands are Carlisle's; in another, he gives up all his rights on them to the company. In one place, he pays cash; in another, he takes the lands for an old debt, exaggerated to $85,000, the lands valued, however, so as to practically pay that. He clearly gets and pockets that much *cash* in consideration of giving up his claims to the lands, and yet he owns them just as

before. His debt, with others, amounts to $25,000 and shortly after to $85,000, and even this does not answer the exigencies of this case, and it swells to grander and vague proportions. His debt of $85,000 is about paid, and yet he holds on to $100,000 worth of lands as collateral security. He holds the lands and road under a mortgage of the whole, and owned nearly everything as stockholder. And so the story winds and twists until the head swims in trying to keep up with this ubiquitous man, who can not speak of himself long without speaking as though he were the railroad company and the whole of it, and yet has parted with every share of stock.

We believe courts of equity endeavor to get at what is fair and right, and often rip up apparently good legal transfers in order to do so.

This is not a criminal case, but a case in equity, and we expect all an individual would in equity be held entitled to get.

The plain facts are that we are being deprived of a large amount of our property on what are pretexts rather than substantial reasons.

The company, *not the State*, owes Carlisle a debt of $11,000 before 1861, for alleged grading and the like. He is practically paid off in 1887, and overpaid, for it is in evidence that the lands he got were really worth far more than his debt. Still, he holds on to 42,372.84 acres of our lands, admitted to be worth $104,000, other lands admitted to be worth $80,000, cash from $90,000 to $100,000.

It does not appear that the company was insolvent all the time that debt of $11,000 was owing, and we seriously

doubt that this court will overlook the extraordinary use made of that small debt, to the profit of so prominent a member of the company, or will close its eyes to the evidences of imposition upon the United States and the State, to say nothing of any stockholders of the company. The debt could have been early paid by selling a few lands to others, if money was lacking.

The United States did not turn over this grant to the State, nor the State entrust it to the company, for the benefit of the Company, but to accomplish an object of internal improvement. The payment of the company's small debts, over a generation old, and the discharge of the liability of the company to damages for not paying them sooner, were not the objects of the State or of the United States. The lands were not given except to be used as means to accomplish the building of the road, and the sales to Carlisle tended in no way to accomplish that aim, nor were they so intended. Not an item of road building was expected to follow them.

The whole matter looks like a scheme to benefit Carlisle and not to build the road, and to benefit the company, at a time (February, 1887) when Congress was moving to secure an adjustment of land grants and the recovery of lands granted, and talking about *bona fide* purchasers. The general adjustment act was approved March 3, 1887. The Commissioner of the Land Office had been stirring things up during the previous year, and a pretext was made of this old barred debt to get these lands out of reach of the storm. The company owed Carlisle, but Carlisle seems to have been the company, and so owed himself.

It seems to have been deemed convenient just then to have Carlisle appear to be a purchaser for cash of a large part of the lands, and as this left the sold but unpaid for lands, it seems to have occurred to someone, at some uncertain time, to turn these over to him.

The court will weigh the evidence bearing on this branch of the case, and we ask that it do so without solely regarding the mere question of positive fraud by Carlisle, but in order to ascertain whether principles and decisions applicable to other cases and sought to be applied here ought to be so applied, in view of all the circumstances; or, on the other hand, the assumptions made in those cases can not be here, and equity requires a disposition of this case otherwise—as, for example, on principles concerning a trustee's duties, contracting with one's self, constructive fraud, and fair dealing generally. Mr. Carlisle, part of the company, and as such a trustee as to these lands, taking them over to himself as debtor, was, it seems to us, required to make these transactions appear as clear and free from taint as transactions can be. It does not seem sufficient for the parties concerned to deny the existence of a formal secret trust title at the time the deeds were made. The company, somehow, did continue to own the lands, and seems to have gotten Carlisle to relinquish his "claim" in 1888. (R.; p. 194).

He appears to have had nine-tenths of the stock of the company (R., p. 195), and somehow to have had possession of all the company's property. (Ibid.)

He still claims all the lands, after releasing all claim to them, and no explanation is offered.

He says the company gave him a mortgage in 1883 on everything it had (R., p. 151), this mortgage being the resolution of 1883 (R., p. 88). Is it not to this mortgage rather than to the deeds of 1887 that the transaction of 1888 (R., p. 194) seems to refer? Otherwise, why had he a mere "claim upon the lands of this company?" Does not this suffice to raise a probability that the deeds were somehow not absolute?

What we are saying now about the assumptions made in other cases and improper to make here is important, if we are wrong in supposing that whoever took the lands in the first 120 sections after 1866 (and especially Carlisle), took them subject to the condition of the act of 1856, that all lands unsold in 1866 should be forfeited to the United States if the road was not completed, which, of course, it was not in 1866 or 1887 or 1890.

But we would not be understood as suggesting *any doubt on that* proposition. If there were any, as a matter of analogy from the interpretation of deeds and conveyances, we submit

9.

that the act of 1856 is a statute of the United States and not a private writing.

It should receive a reasonable interpretation. It is not a deed *and* a law. It is only a law. Courts sometimes, considering certain of its effects, call such a statute a deed, contract, or grant; but this is a mere allusion to what some of its effects are. It is an act of Congress, and as such, supreme law of the land.

So regarded, can there be a doubt that lands unsold in 1866, if the road was then unfinished, should become the property of the United States?

Was not the statute a law intended to take away as well as to give title? Is a law itself to be interpreted as would be a private paper made subject to the law? (See *M. T. & K. R. R.* v. *Kans. Pac. R. R.*, 97 U. S., 491.)

The intent of the statute may have been, as held in *Schulenberg* v. *Harriman*, such that third parties could not meddle with the lands, if the Government did nothing to assert its rights. But are not those rights statutory rights which became complete in 1866, not as rights of immediate possession capable of sustaining an action of trover against a third person, but as rights of property? An owner may have no right of immediate possession, but he is none the less owner. It seems to us that the courts have gone quite far enough in assuming that a law of Congress is a mere private deed, and that this case affords a very fair opportunity for observations as to the supreme law of the land, which is as high as any law relating to private conveyances and as much law as any other.

The Loughrey Case, the Schulenberg Case, and the Courtright Case, if confined to the issues litigated and decided, viz, whether an immediate right of possession existed, whether a State officer could not take timber from a trespasser on the lands, and whether 120 sections of land could be sold within the ten years in advance of building the road, do not seem to be obstacles in the way

of a decision that all sales after 1866 were illegal and void as against the Government; that the title of the State was thereafter a shadowy title, inalienable and held in trust for the United States, and that the omission of the Government to assert its rights gave no right to the State or anyone else to do any thing with regard to the title. It is quite immaterial whether the precise situation of the title after 1866 has a complete analogy in the common law or not—an obvious proposition, which, however, seems to be somehow overlooked.

Such seems to be the meaning of the language used in the act of 1856, *forbidding* any further sales, and enacting that all unsold lands should then *revert* to the United States; and we see no reason why this law should not be interpreted and carried out like any other, as an expression of the lawmaker's will and exertion of his power to order and forbid, anything in any other law or thing to the contrary notwithstanding.

We think this court, in *United States* v. *Loughrey*, makes a very near approach to what we believe should be held, for it says:

> To sustain this action there must be an *immediate* right of possession *when* the timber is cut. *This* might arise if the severance of the timber involved a breach of obligation on the part of the tenant [i. e., the State]; but if the timber were cut by a third person the question would be as to the right to the timber so cut as against the trespasser, and, unless the case of *Schulenberg* v. *Harriman* is to be overruled, it must be held to be that of the State.

Could such a breach of covenant possibly give the Government an immediate right of possession of cut

timber at the time of the breach, and a total forfeiture asserted by the proper organ of the Government—its Attorney-General—be regarded as giving no right at all at the time of the forfeiture incurred?

And in the Loughrey case it is said that if the State sues for and recovers the value of the timber cut, it may be accountable for the value to the United States, if a subsequent forfeiture act concerning the land is passed, notwithstanding such a subsequent act could not operate on the timber which had ceased to be the land by being severed and carried away. If so, shall we be told that we have no right to raise any question at all about what was done or attempted to be done to the lands themselves, because what happened before September, 1890, is no affair of ours—because before that the State had absolute power to deal with them as its own in every sense or respect, without our having any right to inquire or complain?

We do not think that this court is prepared to go quite as far as that, in disregard of what any common intelligence would understand by the act of 1856, and of the Government's rights thereunder.

10.

It would seem that this case is a very simple one.

The United States, for the purpose of an internal improvement of the United States, turned over to the government of the locality the title to lands along 36 miles of a proposed road, to be held subject to several conditions which were designed to secure promptness of construction, the faithful application of the lands to the

accomplishment of the improvement, their sale only as the work progressed (except as to 120 sections intended for preliminary preparations), and the return of all lands not sold at the end of ten years, unless, in the meantime, the road had been completed.

Not a single condition was complied with. The ten years expired and the road had not been completed; no lands had been sold; the 120 sections had not been used as intended or sold at all.

The law declared that after ten years, unless the road was *completed*, no further sales should be made and the lands unsold should revert to the United States.

Yet sales were made many years later, not only in defiance of this prohibition, but in disregard of the condition precedent that 20 continuous miles should first be built (as to all but the 120 sections).

That the United States, in fairness and right, became entitled to all the lands at the end of the ten years is not denied.

That it could have sued for and recovered every acre is not to be questioned. That no one could buy without knowledge of the law is undisputed. That the United States and its officials acted in all respects properly, misled no one, and relied, and had a right to rely, upon the holder of the legal title's acting in accordance with the law are manifest facts.

But upon inquiring into the matter it finds that the law has been utterly disregarded and defied and its confidence betrayed, not by the State, but by those employed by the State as its substitute to carry out the law under

a law of its own reaffirming that of the United States and ordering its faithful execution.

By the proper organ of the Government it claims its rights under the law. Had it done so in 1866 the courts would have declared, not that they would confer rights upon the United States, but that bringing suit was equivalent to entry and that the rights of the United States were complete when the ten years expired, except as to the right of immediate possession, which existed from the moment of entry by suit brought. In other words, the courts would have *decided* what *were* the rights of the Government upon the law and facts, and no question would have been permitted, after suit brought, that the lands being unsold belonged to the United States as soon as the ten years expired.

It seems to me this is consistent with the views of the majority and minority of the court in the Loughrey Case.

If such would have been the decision in 1866, it would have carried with it a denial of the validity of any sale between the date of forfeiture and reentry by suit, not only as forbidden by law, and therefore to be gotten rid of by relation, but as being a sale of what belonged to the United States.

It is true that some language is used in conflict with the declaration of the statute that there is a *reversion*, or shall be a *reverting* to the United States—that "the lands shall *then revert*"—and some language in conflict with that of the statute declaring, as supreme law, that "no further sales shall be made," and "a mere possibility of reversion," even after the event which put an end to all doubt

had occurred and the fact existed upon which the statute said there should be a reversion or reverting, is spoken of. But much of this is argumentative and, like the dictum in *Schulenberg* v. *Harriman*, so much quoted, unnecessary to the decision of the question before the court. The right to make further sales was not in question in either case.

With some exceptions, it is the business of the courts to declare and enforce existing rights. We must look elsewhere to find how, when, and where came the rights into being. If the United States, suing in 1866, had maintained its suit, we think it unquestionable that the law of 1856 and the reentry and the fact of failure to complete the road, and not anything the court was to do, created the rights of the Government; and that the words "shall *then* revert" would have been decided to determine when the reverting took place. It would never have been held that those words meant that a possibility of reversion then began, or that the Government was merely in the position of an assignee of a lessor under the statute of Henry VIII permitting him to assign his interest in the lease. The reversion of the title was absolute and complete. No deed of reconveyance was intended to be given, but the statute which gave the title gave also the reversion.

Of course, we recognize that the court is not likely to overrule the particular points necessarily decided in previous cases; but we do not see that it is necessary to do that in order to affirm that where the Government has entered after forfeiture incurred the land itself is to

be regarded as recoverable, free of all incumbrances subsequent to the forfeiture, and for that purpose, if not for all, is to be regarded as ours from the time of forfeiture.

This particular aspect of the matter does not seem to have been passed upon and is easily distinguishable from those which have been.

The neglect of the Attorney-General to sue in 1866 can not affect the Government's rights, and how such a neglect might operate in the case of an individual grantor need not be considered. Nor is there any question of the Government's waiving its rights. That it would have done so had the road been completed after 1866 is probable, but that is immaterial. Great and repeated efforts to get it to extend or renew the grant failed. It did so in other cases, thus recognizing that a new law was necessary for the purpose. If one is held not to be, then a principal aim of such laws, to compel speedy construction, is defeated by the courts. Moreover, there was a general law recognizing lands to belong to the Government "at the expiration of the grant" in all cases. (Act of April 21, 1876, section 3.) Section 4, act of March 2, 1889, is in *pari materia* and seems to have a similar meaning.

As we have said, everyone knew the law. Everyone undertaking to buy under it knew also that the road had not been completed. Such a fact is notorious in the vicinity of the road. There could be no purchase in ignorance of either the law or that fact, and the United States did nothing to estop themselves from asserting either.

There could be no purchase, for there was no power to sell. Everyone knew this also.

But if, in deference to dicta or decisions, the power to sell is held to have existed, it was a power to sell subject to the known conditions and limitations of the grant, and, therefore, to all the rights of the Government.

How it can possibly be law that the conditions and limitations could be gotten rid of entirely passes our comprehension. The proposition seems utterly unjust and unreasonable. We do not understand this court to have intended to decide in favor of it, even as a question of private deeds, much less as a question of statutory construction of such an act as that of 1856.

It seems to us, therefore, that all the lands should be declared to belong to the Government, with a title as free from claims and encumbrances as when granted.

But, if this is not so, then clearly all the lands forbidden to be sold, except after a condition *precedent* fulfilled should be so declared, the condition not having been fulfilled.

If not so, then all such lands not opposite completed road before 1890, supposing the act of that year to be a grant of those so opposite.

In none of the supposed cases can any valid purchase of the lands have taken place, nor can any *bona fide* or good-faith purchaser, no matter how defined, exist, by estoppel or otherwise.

If they can, however, yet lands the title to which remains in the grantee, including the forty odd thousand acres contracted to be sold (R., pp. 238, 237, 236, 6, 7, 8, 86, 69, 145), are not in the hands of such purchasers.

None of the lands sold to Carlisle by a questionable transaction concerning a barred debt and the like, which transaction was undone soon after, leaving the lands as before in the hands of the company, can be regarded as in the hands of a *bona fide* purchaser, even if nothing but constructive fraud in these dealings with lands held in trust has been successfully brought out by painful efforts against the combined concealments and manipulations and entanglements of the company and Carlisle, who seems to have been nine-tenths of the company. And it is inequitable to sanction the proposition that the company should deprive us of those lands with the aid of Carlisle, on the pretext of *bona fide* purchase. Carlisle and the company, of all others, best knew the rights of the Government, and even obtained the passage of the act of 1856 and made vain efforts to get the grant revived.

Not *bona fides*, but only an actual right and power to sell and to give a good, unconditional title, can give Carlisle or the company any pretense of a right to any of the lands. If there can be any holding merely by *bona fide* purchase, neither of them can rely upon that principle, if anyone can, which we confidently deny. His *quitclaim deed*, of course, does not make him a *bona fide* purchaser of the 17,000 acres. Nor does it seem that the acts of March, 1887, and March, 1896, can play any part as to this question of *bona fide* purchase, except (if at all) as to lands within the 120 sections in the indemnity limits, no others being patented or certified lands within the meaning of those acts, the information lists as to place lands being of no legal effect, merely for

information, and not requiring to be canceled by suit in any case and not "erroneous" issues of title.

The case, as we say, seems to be a very simple one. It has suited the purposes of those who, failing to get the grant extended, set their heads together to deprive the Government of its lands on some pretext or other, to complicate it, to obscure it, to twist and turn and confuse it, in hopes that the courts will not be able or have the patience to straighten it out and do justice between the parties. But this hope will fail, for this court must recognize the vast importance of a correct decision, seeing that so many similar grants have been made and "expired."

To affirm the theory that the act of 1890 was a grant of all lands opposite completed roads throughout the United States, regardless of all causes of forfeiture, would alone involve an enormous loss to the public, and to affirm the other theory as to lands unsold within the time limited in the grant would be equally disastrous to the trust fund of public lands held for the common benefit.

Moreover, the interests of thousands of settlers and other individuals in many regions depend upon the decision of this case; interests for the most part, and certainly in this case itself, identical with those of the United States; in many instances the interests of settlers being in conflict with those of pretended purchasers. (See secs. 2 and 3, forfeiture act of 1890.)

11.

As we have asked for an accounting and none of the objections raised in *U. S.* v. *Winona & St. Peter* exist, the court will find no difficulty in requiring the value of the lands held by any *bona fide* purchaser to be paid to the Government.

If this question of *bona fide* purchase is held against us and in any way this question of value of the lands is to be settled, it is submitted that we are entitled to it aside from the acts of 1887 and 1896 and are restricted to the minimum price only in the case of suits under them. The minimum price is $2.50 per acre.

12.

A statute which has more than one important bearing on this case seems to have been overlooked by the courts, although referred to in Land Office papers concerning certifications of lands for other than the Tennessee and Coosa Company—that is, the *post bellum* certifications mentioned in the Record (pp. 14, 15, 28, 31, etc.).

It is the act of April 10, 1869, and declares that "so much of the *grant of lands* made to the State" by the act of 1856 "as were granted to assist in the building of railroads from near Gadsden to" [describing two roads other than the Tennessee and Coosa] "*is hereby revived* and renewed, subject to all the conditions and restrictions contained in the act referred to, and subject to the further limitation that if either of the said railroads is not completed within three years from the passage of this act no

further sale shall be made for the benefit of such railroad: *Provided*, that the lands granted by the act hereby revived, except mineral lands, shall be sold to actual settlers *only* in quantities *not greater than one quarter section to any one purchaser*, and for a price not exceeding two dollars and fifty cents per acre."

It seems to me this is a legislative declaration that Congress insisted upon the forfeiture incurred under the act of 1856, as it *revived* and *renewed* part of the grant, recognizing it as dead, and refused to do so as to the rest. But if that be not the implied meaning of this act, what possible basis can there be for the argument that the act of 1890 has the implied meaning (*adverse to the public rights*) asserted by the lower court?

However, suppose this is erroneous and the Tennessee and Coosa lands still subject to sale after 1866, as claimed, here is a law of 1869 saying that "*the lands granted by the act* hereby revived" (act of 1856) shall be sold to actual settlers *only*, and even to them but one quarter section apiece.

What becomes of the two deeds to Carlisle, in view of this law?

A similar law as to a third road was passed March 3, 1871, the same language throughout being used (16 Stat., 580).

These laws and the act of April 10, 1869, do not seem to have been mentioned below.

13.

That a grant of public property or rights must be unambiguous, and that the act of 1890 is therefore not

an absurd and improvident grant of all previously forfeited place and selected *indemnity* lands (selected for all parts of the roads) opposite constructed roads. See

Rice v. *Railroad Co.*, 1 Black, 359.
Slidell v. *Grandjean*, 111 U. S., 412.
Charles River Bridge v. *Warren Bridge*, 11 Peters, 421.
Litchfield v. *Webster Co.*, 101 U. S., 775.

That mere contract to buy, the price not having been paid, does not make a *bona fide* purchaser. See

Lytle v. *Lansing*, 147 U. S., 70.
Dresser v. *Missouri Co.*, 93 U. S., 92.
Jennison v. *Leonard*, 21 Wall., 309.
Williams v. *United States*, 138, 516.

That neither does a quitclaim deed. See

Wood v. *Holly Mfg. Co.*, 13 South. Rep., 948.
O'Neill v. *Seixas*, 85 Ala., 80.

That, contrary to the view of the *trial* court, the Attorney-General may make entry for the Government after the forfeiture. See

United States v. *Throckmorton*, 98 U. S., 70.
United States v. *Tin Co.*, 125 U. S., 178.
United States v. *Beebe*, 121 U. S., 338.
United States v. *M. & C. R. Co.*, 141 U. S., 382.
Van Wyck v. *Knevals*, 106 U. S., 360.
Schlesinger v. *Kansas City*, 152 U. S., 453.
Act of Congress creating office of Attorney-General.

That no mortgage or pledge of lands could make a man a statutory, *bona fide* purchaser. See act of March 31, 1887, section 4, and act of May 2, 1896, being acts *in pari materia*.

The settlement with Carlisle in 1887 by means of our property held in trust, which arrangement was undone and a different settlement made for paying him off in 1888, would, if used and allowed to deprive us of our property on the pretext that this created a *bona fide* purchase, probably be equivalent to a constructive fraud, irrespective of any intent. See

Dwight v. *Blackman*, 2 Mich., 330.
Stephen v. *Beall*, 22 Wall., 329.
Smith v. *Frost*, 70 N. Y., 65.
Brown v. *Cowell*, 116 Mass., 461.
2 Pomeroy Eq. Jur., 956.
Also Rec., p. 230, etc.

In view of what *thus* appears, to say nothing of our affirmative evidence as to the resolution quoted on R., p. 231, the burden of showing a *bona fide* purchase is not sustained by Carlisle.

We think the act of April 10, 1869, was a sufficient entry by Congress for the forfeiture to be regarded as consummated, if not already so.

We think sec. 3 of the act of April 21, 1876, was the same. Congress thereby proceeded to dispose of the lands as its own.

We think both acts together were certainly sufficient.

Respectfully submitted.

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